



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 27, 2021 Government Records Council Meeting

Kathleen Ma
Complainant

Complaint No. 2019-212

v.

Port Authority of NY and NJ
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council ("Council") considered the April 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Specifically, the Port Authority of New York & New Jersey shared control over the Registry through its partnership with the Sustainable Terminal Services, Inc. and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it to the Complainant; or 2) deny access and provide a specific lawful basis for said denial.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of April 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Kathleen Ma¹
Complainant**

GRC Complaint No. 2019-212

v.

**Port Authority of NY and NJ²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of a list of drayage trucks registered in the “Drayage Truck Registry” (“Registry”) inclusive of twelve (12) individual pieces of information for each registered truck.

Custodian of Record: William Shalewitz

Request Received by Custodian: July 18, 2019

Response Made by Custodian: July 25, 2019

GRC Complaint Received: October 16, 2019

Background³

Request and Response:

On July 9, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 25, 2019, the Custodian responded in writing extending the response time frame through August 22, 2019 to search for responsive records. On August 19, 2019, the Custodian responded in writing denying the Complainant’s OPRA request because no responsive records exist. The Custodian noted that the Registry was migrated to the newly created Radio Frequency Identification (“RFI”) tracking system created and maintained by a “consortium of terminal operators.”

On September 9, 2019, Complainant’s Counsel sent a letter to the Custodian stating that she is aware that the Custodian was referring to the “Port Truck Pass” (“PTP”) system. Counsel asserted that although the Port Authority of New York and New Jersey (“PANYNJ”) retained a third party to operate the PTP system, it was not absolved of obtaining and disclosing records maintained therein. Lagerkvist v. Dep’t of Env’tl. Prot., 2011 N.J. Super. Unpub LEXIS 1912 (July 12, 2011) (citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010)). Counsel stated that the PANYNJ’s own regulations and rules “retains, appropriately, the power and

¹ Represented by Emma Rebhorn, Esq. (New York, NY).

² Represented by Caitlin Sullivan, Esq. (New York, NY).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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responsibility to govern access to its terminals . . . but specifically with regard to drayage trucks.” FMC Schedule No. PA 10; Rules and Regulations, Subrule 34-1150. Counsel thus “reiterated” the subject OPRA request and asked that the Custodian respond within seven (7) business days.

On September 24, 2019, Complainant’s Counsel e-mailed the Custodian advising that he failed to respond to her September 9, 2019 letter. Counsel noted that should the Complainant file a complaint, she would be compelled to also seek an award of attorney’s fees. On September 30, 2019, Assistant General Counsel Stephen Marinko sent Complainant’s Counsel a letter stating that PANYNJ was initiating an internal “administrative appeal” and will decide that appeal within ten (10) business days. On October 2, 2019, Complainant’s Counsel acknowledged that PANYNJ was reviewing its denial of the subject OPRA request.

On October 11, 2019, Freedom of Information Office Bin Bin Chen responded in writing advising that PANYNJ reviewed Complainant Counsel’s “appeal” and was denying same. Mr. Chen noted that PANYNJ did not retain a third-party to manage the PTP system and thus Lagerkvist was not applicable. Mr. Chen stated that although PANYNJ retains full control over its terminals, this control does not require it to also maintain drayage records.

Denial of Access Complaint:

On October 16, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that in 2012, the PANYNJ contracted with Sustainable Terminal Services (“STS”) to operate their PTP system. The Complainant noted that the PTP system appears to be that referred to in the Custodian’s initial denial of access. The Complainant stated that PANYNJ’s Rules and Regulations noted that PTP was a “nonprofit corporation created by marine terminal operators to promote secure, environmentally sensitive, and efficient marine terminal operations in the [PANYNJ].” PAMT FMC No. PA 10; Subrule 34-1072. The Complainant further stated that PANYNJ also acknowledged its obligation “in connection with the [R]egistry” by stating that it “will supplement security programs already in place and all the [PANYNJ] and its terminal operators to know the content of containers coming to and from the port . . .” The Complainant noted that the PANYNJ, consistent with the foregoing obligation, released a list of drayage trucks in response to OPRA requests as recently as 2017. The Complainant contended that it now appears that PANYNJ has decided in the last two (2) years that “these once-public records should be concealed from public view.”

The Complainant contended that the requested list is specifically referred to in PANYNJ’s regulations. PAMT FMC No. PA 10; Subrule 34-1080, Section G. The Complainant argued that PANYNJ’s regulations and rules clearly require the existence of the Registry and that any argument that it can effectively perform its functions without creating and maintaining same is “absurd.” The Complainant argued that to the extent that PANYNJ contracted with a third-party, which it refuted in its second denial of the request, then the Custodian had an obligation to produce the requested records. The Complainant further asserted that PANYNJ retained “ready access” to the Registry but was nonetheless required to obtain and disclose records in the instance that it did not have access.

The Complainant asserted that New Jersey precedent and PANYNJ's authority and obligation regarding drayage trucks, as well as their previous disclosures, prove that the Custodian unlawfully denied access to the Registry sought here. The Complainant thus requested that the Council: 1) order disclosure of the Registry "within two [(2)] business days;" and 2) determine that the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

Statement of Information:⁴

On March 6, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 8, 2019. The Custodian certified that his search included forwarding the request to the Port Department, who advised that the Registry "belonged to a third party" and no records existed. The Custodian certified that he responded in writing on July 25, 2019 extending the time frame to respond before ultimately denying access to the OPRA request on August 18, 2019 because no records existed.

The Custodian contended that PANYNJ does not possess the records sought because the "aggregate data of the [Registry] are not kept, held, filed, produced, or reproduced with or for" it. The Custodian argued that instead, the Registry is created and maintained by STS and no legal authority required PANYNJ to ask the third party to obtain same. The Custodian noted that notwithstanding this position, PANYNJ attempted to obtain the responsive Registry data from STS but "such permission was denied."

The Custodian asserted that PANYNJ did not contract the storage and maintenance of the Registry to STS. The Custodian asserted that instead, the Registry was "migrated" to an RFI tracking system created and maintained by STS on behalf of a consortium of terminal operators. The Custodian stated that PANYNJ receives periodic reports "based on some of this data" and can query the Registry individually per its contract with STS. The Custodian argued that its contract with STS supports that PANYNJ had no access to the underlying data.

The Custodian further argued that Burnett, 415 N.J. Super. 506 is not applicable here because STS does not make or maintain the Registry on PANYNJ's behalf. The Custodian contended that PANYNJ did not contract with STS to manage the Registry; rather, PANYNJ chose to no longer maintain it and decided that limited access through the new RFI system was sufficient. The Custodian noted that whether PANYNJ previously maintained and disclosed Registry data in response to an OPRA request does not convert STS's Registry data into a "government record."

The Custodian finally asserted that its 2011 Port of New York and New Jersey Sustainable Services Agreement allowed operator-members to designate certain drayage information as confidential. FMC No. 201210. The Custodian asserted that the agreement requires PANYNJ to contact that operator-members to alert them to a request for disclosure in instances where the drayage data is marked confidential. The Custodian asserted that the operator-members have an opportunity to explain the reasons for the confidential designation, which PANYNJ may decline. The Custodian noted that should PANYNJ decline the explanation, operator-members have an

⁴ On November 6, 2019, this complaint was referred to mediation. On February 25, 2020, this complaint was referred back to the GRC for adjudication.

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ability to submit additional information and appeal disclosure pursuant to PANYNJ's freedom of information policy.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Burnett, 415 N.J. Super. 506, the custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division reviewed the Law Division's ruling, interpreting Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005) and holding that the defendant did not have to disclose the records responsive to the plaintiff's OPRA request because the records were not in the defendant's possession. The Appellate Division found that the motion judge interpreted Bent, *supra*, too broadly. The Appellate Division held:

We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

[Id. at 517.]

However, in Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the relationship between the advertising agency and NJ Transit, finding that unlike the custodian in Burnett, 415 N.J. Super. 506, NJ Transit was not bound by, nor has any discretion over, contracts made between the advertising agency and client vendors. Hittinger, GRC 2013-324. The terms of the agreement between NJ Transit and the advertising agency provided that the agency accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

At issue before the Council is whether the Custodian had the ability and obligation to obtain the responsive Registry information from STS and disclose it to in response to the subject OPRA request. The Complainant has argued that long after the 2012 launch of the RFI program, PANYNJ disclosed the information sought here in 2017. The Complainant thus disputed that PANYNJ did

not maintain any responsive records and argued that the Custodian had an obligation to obtain the information from the Registry and disclose it. See Lagerkvist, 2011 N.J. Super. Unpub LEXIS 1912. Conversely, the Custodian has argued that the PANYNJ no longer maintained the information because it transferred the Registry to the STS. The Custodian also argued that prior disclosure of the information did not convert the Registry to a “government record” here. Further, the Custodian noted that although the agreement between PANYNJ and STS set forth a process by which the Custodian could obtain responsive records when requested, STS denied him access to the requested Registry information.

Initially, the GRC disagrees with the Complainant that Lagerkvist applies to and controls this case. Lagerkvist involved a third party that was a conglomerate of ten (10) states including New Jersey which the court concluded was a “public agency” under OPRA as an instrumentality of the State. Id. at 11; 25-26. The same cannot be said here because, as noted by the Complainant, the STS is a “nonprofit corporation created by marine terminal operators to promote secure, environmentally sensitive, and efficient marine terminal operations in the [PANYNJ].” PAMT FMC No. PA 10; Subrule 34-1072 (providing that the PTP system is a service provided by the STS). Further, neither the Complainant nor Custodian have asserted that the STS is a “public agency” which is in contrast to Lagerkvist.

In comparing this complaint to both Burnett, 415 N.J. Super. 506 and Hittinger, GRC 2013-234, the GRC is persuaded that the facts here trend towards the former and away from the latter. In support of this conclusion, the GRC first notes that PANYNJ’s September 20, 2012 press release on the RFI initiative frames its agreement with the STS as a partnership wherein they shared the cost of implementing the system.⁵ Further, as the Custodian stated in the SOI, PANYNJ’s agreement with STS sets forth a process by which information possessed by STS can be obtained for disclosure in response to an OPRA request. See FMC No. 201210 at Article VIII(D)-(E). This is direct contradiction with the assertion that PANYNJ did not maintain the requested Registry information and that no legal authority requiring it to obtain such information from a third party existed. Further contradictions exist in the Custodian’s assertion that PANYNJ receives periodic reports containing certain information and can query the Registry for individual records. All of the forgoing taken together supports that the STS is maintaining the Registry for, or on behalf of, PANYNJ and that the Custodian had an obligation to obtain and disclose the responsive data or deny access under a specific lawful basis.

Accordingly, the Custodian may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506. Specifically, the PANYNJ shared control over the Registry through its partnership with the STS and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.

Knowing & Willful

⁵ https://www.panynj.gov/port-authority/en/press-room/press-release-archives/2012_press_releases/port_authority_partnerswithsustainableterminalservicestobringrfi.html (accessed April 8, 2021)

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Specifically, the Port Authority of New York & New Jersey shared control over the Registry through its partnership with the Sustainable Terminal Services, Inc. and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

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⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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April 20, 2021